NOT FOR PUBLICATION

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

WALTER HARRELL, Petitioner, v. STATE OF NEW JERSEY, et al., Respondents.	Civil Action No. 08-2225 (JLL) **M E M O R A N D U M** **O P I N I O N** **A N D** **O R D E R**

Presently before the Court is Petitioner Walter Harrell's ("Petitioner" or "Harrell") petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254 ("Petition").

It appearing that:

1. Harrell filed the Petition on May 6, 2008, and submitted the requisite filing fee three days later. On June 12, 2008, Petitioner filed his "Brief on Support of the Writ of Habeas Corpus Petition." See Docket Entry No. 2 ("Memorandum").

2. Petitioner, a civilly committed individual, is currently confined at the Special Treatment Unit at Avenel, New Jersey. (See Pet. at 2.) Petitioner is challenging the order of civil commitment rendered on September 23, 2004 by the Superior Court of New Jersey, Law Division (hereinafter referred to as the "September 23 Order"). (See id.) Petitioner asserts that he appealed the September 23 Order

to the Superior Court of New Jersey, Appellate Division, which affirmed the lower court's decision on March 9, 2007. (See id. at 2-3.) According to the Petition, Harrell sought certification from the Supreme Court of New Jersey, which denied the same on May 15, 2007.[1] (See id. at 3.) The instant Petition followed.

3. While it is apparent on the face of the Petition that Harrell seeks release from his current confinement (see Pet. at 6 (stating that "Petitioner's commitment should be vacated")), the Petition itself only expressly challenges the civil commitment ensuing from the September 23 Order (see id. at 2-3). As of the date of the Petition, Harrell could not have been in custody pursuant to said order as a civil commitment pursuant to an order entered under the New Jersey Sexually Violent Predator Act ("SVPA"), N.J. Stat. Ann. § 30:4-27.24, et seq., cannot exceed the period of one year.[2] See, e.g., In re Civil Commitment of J.H.M., 367

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[1] This Court's own research efforts did not locate any decisions associated with Petitioner's appeal and/or application for certification. However, the Court does not construe this absence as indicative of Petitioner's failure to appeal his 2004 order of civil commitment and presumes, for the purposes of this memorandum opinion only, that Petitioner pursued the appellate processes described in the Petition.

[2] Section 30:4-27.35 provides that "[a] person committed under [the SVPA] shall be afforded an annual court review hearing of the need for involuntary commitment as a sexually violent predator." (Emphasis added.)

N.J. Super. 599, 611 (App. Div. 2003), certif. denied, 179 N.J. 312 (2004) ("[C]ommitment pursuant to SVPA is only potentially indefinite, with one year being the maximum amount of time an individual can be incapacitated pursuant to a single judicial proceeding.") (citations, quotations, and brackets omitted). The order Petitioner is challenging was entered on September 23, 2004, and expired, by operation of law, on September 22, 2005 (see Mem. at 2 (verifying that Petitioner's order of commitment entered on September 23, 2004 was the basis for Petitioner's confinement up until September 22, 2005); therefore, Petitioner must have had, at a minimum, three rounds of civil proceedings prior to the one which resulted in the order expressly challenged in his instant Petition. It follows that Petitioner's confinement ensuing from the September 23 Order has necessarily expired, and Petitioner is currently confined only pursuant to an order of civil commitment entered by the Superior Court of New Jersey, Law Division during or after 2007.

4. If this Court is to construe the Petition as a challenge to the September 23 Order, then it should dismiss the Petition on the basis that Petitioner is not "in custody" pursuant to that order. Section 2254 provides, in pertinent part, that

> a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in

> violation of the Constitution or laws or treaties of the United States.

28 U.S.C. § 2254(a)(emphasis added). While the "in custody" requirement is liberally construed for purposes of habeas corpus, a petitioner must be in custody under the very order he is attacking when the petition is filed in order for this Court to have jurisdiction. See Spencer v. Kemna, 523 U.S. 1, 7 (1998); Maleng v. Cook, 490 U.S. 488, 490-92 (1989) (per curiam). The Supreme Court held in Maleng "that once the sentence imposed for a conviction has completely expired, the collateral consequences of that conviction are not themselves sufficient to render an individual 'in custody' for the purposes of a habeas attack upon it." 490 U.S. at 492; see also Spencer, 523 U.S. at 7; compare DeFoy v. McCullough, 393 F.3d 439, 442 (3d Cir. 2005) (relying, inter alia, on Garlotte v. Fordice, 515 U.S. 39, 41 (1995), for the observation that an inmate is still "in custody" under the already served sentence, if: (a) these sentence were in a string of the inmate's consecutive prison terms, and (b) the challenges are limited to the issue of the inmate's parole eligibility, since the date of parole eligibility is calculated on a *cumulative* basis, unlike the fact of civil commitment which results from--and accrues at--a decision reached after a de novo hearing unrelated to the existence, or the lack, of civil commitment(s) imposed

prior). Since it is evident that the September 23 Order expressly challenged by Petitioner had expired long before he filed the instant Petition, he fails to meet the "in custody" requirement on his challenge to the September 23 Order.[3] See Jackson v. Cal. Dep't of Mental Health, 399 F.3d 1069 (9th Cir. 2005) (a civilly committed sexual predator is not "in custody" pursuant to the order he challenges if, at the time of his habeas filing, he was in custody pursuant to a superceding order of civil commitment). This Court, if it is to read the Petition literally, is constrained to dismiss the same, see Lonchar v. Thomas, 517 U.S. 314, 320 (1996) (a federal court should dismiss a habeas petition if it appears from the face of the application that the petitioner is not entitled to relief); Siers v. Ryan, 773 F.2d 37, 45 (3d Cir. 1985), cert. denied, 490 U.S. 1025 (1989), and to deny Petitioner a certificate of appealability under 28 U.S.C. § 2253(c).[4]

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[3] The Court cannot construe the instant Petition as an application for a writ of error coram nobis. While a writ of error coram nobis has traditionally been used to attack convictions with continuing consequences when the petitioner is no longer "in custody" for purposes of habeas review, see United States v. Baptiste, 223 F.3d 188, 189 (3d Cir. 2000), the writ of error coram nobis is available in federal court only for those who were convicted in a federal court, see 28 U.S.C. 1651(a).

[4] The Anti-Terrorism and Effective Death Penalty Act ("AEDPA") provides that an appeal may not be taken from a final order in a § 2254 proceeding unless a district judge issues a certificate of appealability ("COA") on the ground that "the

5. Mindful of Petitioner's apparent intent to seek release from (and, thus, challenge the fact of) his current confinement, the Court construes the instant Petition as an attack on the order of civil commitment (entered on a date unspecified in the Petition) pursuant to which Petitioner is currently in custody, rather than a challenge to Petitioner's long-expired commitment ensuing from the September 23 Order.[5]

6. The Petition states that Petitioner raised the following challenges ("2004 Grounds") on appeal to his September 23 Order:

> (a) The [state] court erred in relying on hearsay contained in the testimony of the expert witnesses and their reports in reaching its decision;

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applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). In Slack v. McDaniel, 529 U.S. 473 (2000), the United States Supreme Court held that, "[w]hen the district court denies a habeas petition on procedural grounds without reaching the prisoner's underlying constitutional claim, a COA should issue [when] the prisoner shows, at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." Id. at 474. Here, the Court denies Petitioner a COA pursuant to 28 U.S.C. § 2253(c) because it is clear that dismissal of Petitioner's challenge to his expired order of civil commitment for failure to meet the "in custody" requirement is correct.

[5] Habeas Rule 2 provides that a petitioner who seeks relief from different judgments rendered by state courts must file a separate petition covering each separate judgment. See Habeas Rule 2(e). Thus, Petitioner cannot challenge both his 2004 and current orders of civil commitment in this action.

(b) The State failed to prove by clear and convincing evidence at [Petitioner's commitment] hearing that [Petitioner] was subject to commitment as a sexually violent predator;

(c) [Petitioner's] commitment as a sexually violent predator violates the Double Jeopardy and Ex Post Facto Clauses.

(Pet. at 3.) In contrast, Petitioner challenges his current civil commitment on the following four Grounds ("Current Grounds"):

(a) The [state] court erred in relying on hearsay from testimony of expert witnesses to make findings of fact and in reaching its decision to involuntary commit Petitioner in violation of [the] Due Process Clause and[,] therefore[,] the State failed to prove by clear and convincing evidence that Petitioner should have been involuntarily committed.

(b) Petitioner's involuntary commitment under the SVPA violates the . . . Ex Post Facto Clause.

(c) Petitioner's commitment should be vacated as the State has denied Petitioner a less restrictive alternative to protect society from the potential danger of Petitioner, in which the right to free bodily movement is a constitutionally protected fundamental liberty interest.[6]

(d) The Equal Protection [Clause] guarantees . . . require that Petitioner be afforded a trial by jury with New Jersey's past reliance on the Kansas' [Sexually Violent Predator] Act.

(Id. at 5-6.) The Court, thus, construes Petitioner's Current Grounds as challenges to his current order of civil

[6] Petitioner's Memorandum elaborates on his "free bodily movement" claim: Petitioner uses said phrase to refer to one's constitutional right to move between states. See Mem. at 38-42.

commitment, and Petitioner's references to the 2004 Grounds as an assertion that Petitioner exhausted his Current Grounds by offering his 2004 Grounds for the state courts' review.[7]

7. A state prisoner applying for a writ of habeas corpus in federal court must first "exhaust[] the remedies available in the courts of the State," unless "there is an absence of available State corrective process[] or . . . circumstances exist that render such process ineffective." 28 U.S.C. § 2254(b)(1); see Lambert v. Blackwell, 134 F.3d 506, 513 (3d Cir. 1997), cert. denied, 532 U.S. 919 (2001). The courts of a state must be afforded an "opportunity to pass upon and correct alleged violations of its prisoners' federal rights." Picard v. Connor, 404 U.S. 270, 275 (1971); Evans v. Ct. of Common Pleas, Del. Cty., Pa., 959 F.2d 1227, 1230 (3d Cir. 1992), cert. dismissed, 506 U.S. 1089 (1993). A petitioner must exhaust state remedies by presenting each of his federal constitutional claims to every level of the state courts. 28 U.S.C. § 2254(c); see Ross v. Petsock, 868 F.2d 639, 641 (3d Cir. 1989). Once a petitioner's federal claims have been fairly presented to the state's highest

[7] The Court takes such an approach as it does not appear from the face of the Petition that the Current Grounds were presented to the Appellate Division of the Supreme Court of New Jersey.

court, the exhaustion requirement is satisfied. See Picard, 404 U.S. at 275; Castille v. Peoples, 489 U.S. 346, 350 (1989). The petitioner generally bears the burden of proving all facts establishing exhaustion. See Toulson v. Beyer, 987 F.2d 984, 987 (3d Cir. 1993). This means that the claims heard by the state courts must be the "substantial equivalent" of the claims asserted in the federal habeas petition, in essence, the legal theory and factual predicate must be the same. See Picard, 404 U.S. at 275-77.

8. Federal courts have consistently adhered to the exhaustion doctrine "for it would be unseemly in our dual system of government for a federal district court to upset a state court conviction without an opportunity to the state courts to correct a constitutional violation." Picard, 404 U.S. at 275 (citations and internal quotation marks omitted). The exhaustion requirement is designed to allow state courts the first opportunity to pass upon federal constitutional claims, in furtherance of the policies of comity and federalism. See Granberry v. Greer, 481 U.S. 129, 131 (1987); Rose v. Lundy, 455 U.S. 509, 516-18 (1982); O'Halloran v. Ryan, 835 F.2d 506, 509 (3d Cir. 1987). However, even if a petitioner's claims have not been exhausted in the state courts, the petitioner might, under

certain circumstances, be entitled to review of his claims by a federal court.[8] See, e.g., Frisbie v. Collins, 342 U.S. 519, 521 (1952) (non-exhaustion properly overlooked where "special circumstances" required "prompt federal intervention"). Because (a) "the failure to exhaust state remedies does not deprive [a federal court] of jurisdiction to consider the merits of a habeas corpus application," Granberry, 481 U.S. at 131 (citing Strickland v. Washington, 466 U.S. 668, 684 (1984)); (b) "the general rule of exhaustion 'is not rigid and inflexible,'" Granberry, 481 U.S. at 136 (quoting Frisbie, 342 U.S. at 521); and (c) the exhaustion doctrine and its currently codified exceptions

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[8] Addressing the issue of exhaustion and exceptions to the exhaustion requirement, Section 2254 provides that:

> (1) An application for a writ of habeas corpus . . . shall not be granted unless it appears that--
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> (A) the applicant has exhausted the remedies available in the courts of the State; or
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> (B) (i) there is an absence of available State corrective process; or
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> (ii) circumstances exist that render such process ineffective to protect the rights of the applicant.
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> (2) An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State.

28 U.,S.C. § 2254(b).

have a long history of judicial development both before and after their initial codification, see Brown v. Allen, 344 U.S. 443, 447-48 and n.3 (1953), the Supreme Court and several lower courts have applied exceptions to the exhaustion requirement. See Granberry, 481 U.S. at 131; Smith v. Goguen, 415 U.S. 566, 576-77 & n.19 (1974); Frisbie, 342 U.S. at 521-22; cf. Duckworth v. Serrano, 454 U.S. 1, 5 (1981); see also Weaver v. Foltz, 888 F.2d 1097, 1099-1100 (6th Cir. 1989); Lockett v. Illinois Parole & Pardon Bd., 600 F.2d 116, 117 (7th Cir. 1979); Sostre v. Festa, 513 F.2d 1313, 1314 n.1 (2d Cir.), cert. denied, 423 U.S. 841 (1975); West v. Louisiana, 478 F.2d 1026, 1034-35 (5th Cir. 1973), adhered to in relevant part, 510 F.2d 363 (5th Cir. 1975) (en banc); Jenkins v. Fitzberger, 440 F.2d 1188, 1189 (4th Cir. 1971) (per curiam). In general, the question of whether the circumstances excusing exhaustion "exist calls for a factual appraisal by the court in each special situation." Granberry, 481 U.S. at 136 (quoting Frisbie, 342 U.S. at 522). While, indeed, those special circumstances "peculiar to [an individual] case, may never come up again, and a discussion of them could not give precision to the 'special circumstances' rule," Frisbie, 342 U.S. at 522, these exceptions might occur, for instance, in cases where enforcement of the exhaustion appears futile, or

where dismissal would serve no interest, state or federal, and enforcement of the exhaustion requirement would burden the states with unnecessary litigation or would constitute a "hollow exercise in etiquette." See Little Light v. Crist, 649 F.2d 682, 684-85 (9th Cir. 1981) ("considerations of fairness" and desire to avoid burdening state judiciary supersede exhaustion doctrine); Nash v. Israel, 533 F. Supp. 1378, 1380 (E.D. Wis. 1982) (dismissal "would serve no purpose"); Emmett v. Ricketts, 397 F. Supp. 1025, 1047 (N.D. Ga. 1975) (stating that requiring exhaustion in the state courts in the particular circumstances of the case would be a "hollow exercise in etiquette").

9. To illustrate, lack of exhaustion in the state courts might be excused if: (a) the highest state court consistently or recently has rejected claims identical to the petitioner's; or (b) all of the intermediate appellate courts in the state have rejected claims identical to the petitioner's, and the highest court has let those decisions stand; or (c) the state courts rejected an identical claim made by the petitioner's co-defendant; or (d) the state courts' statements or reasoning in denying the petitioner's other claims makes virtually certain that they also would reject the unexhausted claims. See, e.g., Lynce v. Mathis, 519 U.S. 433, 436 n.4 (1997) (noting that the court was

"satisfied . . . that exhaustion would have been futile" because the state Supreme Court had previously rejected the same claim in other cases and counsel for the state had "not suggested any reason why the [state] courts would have decided petitioner's case differently"); Fisher v. Texas, 169 F.3d 295, 303 (5th Cir. 1999) ("The futility exception [to the exhaustion requirement] applies when . . . the highest state court has recently decided the same legal question adversely to the petitioner"); Allen v. Attorney General, 80 F.3d 569, 572-73 (1st Cir. 1996) (finding a claim exhausted because the state's highest court had recently rejected identical claim and noting that, "[i]f stare decisis looms, that is, if a state's highest court has ruled unfavorably on a claim involving facts and issues materially identical to those undergirding a federal habeas petition and there is no plausible reason to believe that a replay will persuade the court to reverse its field, then the state judicial process becomes ineffective as a means of protecting the petitioner's rights"); Cunningham v. DeRobertis, 719 F.2d 892, 894-95 (7th Cir. 1983) (excusing non-exhaustion on the grounds that the state courts rejected an identical claim made by the petitioner's co-defendant and stating that "the issue . . . has been exhausted -- albeit not by petitioner [because the] issue has been squarely

presented to--and rejected by--the [state courts, and] no federalism purpose would be served by requiring petitioner personally to raise the issue again").

10. Consequently, it is not unfathomable for a sexually violent predator to succeed in establishing exhaustion of his challenges to the order mandating his current confinement by showing that he raised the same challenges to all levels of the New Jersey courts when he appealed his prior order of civil commitment, and those current challenges and the exhausted challenges involve materially identical facts and legal issues. See Brown, 344 U.S. at 449, n.3 ("We do not believe Congress intended to require repetitious applications to state courts"); cf. Wilwording v. Swenson, 404 U.S. 249, 250 (1971) ("Section 2254 does not erect insuperable or successive barriers to the invocation of federal habeas corpus. . . . Petitioners are not required to file repetitious applications in the state courts. Nor does the mere possibility of success in additional proceedings bar federal relief"); Cunningham, 719 F.2d at 894-95; Colon, 603 F.2d at 406; Guichard, 471 F. Supp. at 787. This proposition appears to be particularly fitting where, as here, an inflexible joint reading of the "in custody" and exhaustion requirements mandated by Section 2254 might create a nearly impenetrable barrier for a

civilly committed individual subject to yearly re-commitment hearing involving a full de novo finding by the state courts.[9] See In re Commitment of K.D., 357 N.J. Super. 94, 99 (N.J. Super. Ct. App. Div. 2003) ("the purpose [of each SVPA hearing] is to decide if [the next period of] confinement . . . is proper"). This Court, therefore: (a) rejects a reading of the SVPA regime as directly conflicting with mandate of federal habeas review; (b) adopts a harmonized reading of New Jersey's continuous commitment regime under the SVPA and Section 2254's "in custody" and exhaustion requirements, see Pennsylvania v. Dep't of Health

[9] While this Court cannot rule out the possibility that a litigant might be able to duly exhaust his challenges to his order of civil commitment prior to expiration of that order and, with enough time remaining for a habeas review to preserve the federal court's core habeas power to grant relief in the form of release from confinement, the realities of modern litigation render such speedy exhaustion processes highly unlikely. See, e.g., Hubbart v. Knapp, 379 F.3d 773, 778 (9th Cir. 2004), cert. denied, 543 U.S. 1071 (2005) ("We now hold that it is 'almost certain' that a state detainee under [the state] civil commitment scheme for sexually violent predators will be unable to exhaust state remedies and 'fully litigate' a habeas petition in federal courts within two years"). However, the time-consuming realities of modern litigation do not render the SVPA unconstitutional, i.e., a joint reading of the exhaustion and "in custody" requirements through the prism of the state scheme of yearly de novo hearings does not disenfranchise federal courts of their power of habeas review because the federal law provides for exceptions to the exhaustion requirement. Cf. Boumediene v. Bush, --S.Ct.--, No. 06-1195, 2008 WL 2369628, at*44-45, *73 (2008) (stating that a statutory regime is constitutional if it allows inmates confined within the state's de jure power to retain at least a narrow path to invoke the protections of the Suspension Clause).

and Human Servs., 723 F.2d 1114, 1119 (3d Cir. 1983) ("[S]tatutory provisions enacted at different times should be read as harmoniously as possible, so that each is given effect and the provisions do not conflict"); and (c) concludes that a civilly committed petitioner might, as one way of qualifying for an exception to the exhaustion requirement, be able to show a de facto exhaustion of state remedies for the purposes of his challenges to a current order of civil commitment through establishing exhaustion of his prior order of civil commitment. Cf. Wilwording, 404 U.S. at 250; Brown, 344 U.S. at 449, n.3. In such cases, it appears that, at the very least, two showings should be made: (i) the claims challenging the petitioner's current order of commitment and presented for federal habeas review must be materially identical (as to both facts and legal theories) to the challenges to the petitioner's expired commitment order, which were presented to all levels of state court shortly prior to the petitioner's filing of the application at hand; and (ii) the very same challenges must be articulated by the petitioner at least during the state proceedings underlying his current order of civil commitment, if not on appeal. See Hubbart, 379 F.3d at 777 (resolving a similar dilemma by holding that petitioner's "habeas petition [was] not moot because his claims were

capable of repetition yet evading review" and fell within a "well-established exception to mootness").[10] The burden to show exhaustion by establishing such special circumstances, including, inter alia, satisfaction of the aforesaid two requirements, rests squarely with the petitioner. See Toulson, 987 F.2d at 987.

11. Here, Petitioner's application, as drafted, unambiguously indicates that he is unable to meet the exhaustion requirement with respect to his Current Grounds, even if these Grounds were to be construed as challenges to his current commitment order on the basis of Petitioner's exhaustion of his 2004 order.

12. It is true that, with respect to the second requirement, that is, the obligation to articulate the Current Grounds during the state proceedings underlying Petitioner's current commitment, this Court may hypothesize that Petitioner actually presented his Current Grounds for the record (since the Petition is wholly silent as to this issue). Moreover, the Court may even presume that Petitioner would be able to

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[10] In Hubbart, the Court explained that the "well-established exception to mootness applies when '(1) the challenged action is in its duration too short to be fully litigated prior to cessation or expiration, and (2) there is a reasonable expectation that the same complaining party will be subject to the same action again.' " 379 F.3d at 777 (quoting Spencer v. Kemna, 523 U.S. at 17). Said exception seems especially apt in the case at bar.

show that the state courts' review was completed "shortly prior" to his filing of the instant Petition, although the almost one-year period of time separating the May 15, 2007 decision of the Supreme Court of New Jersey and Petitioner's May 6, 2008 filing of the instant Petition certainly calls into question the presumption that Petitioner's exhaustion efforts resulted in state court rulings recent enough for the purposes of this Court's instant collateral review (since the state courts could have, indeed, changed their position on the issues presented by Petitioner within the period of virtually a year). While able to make such allowances, this Court cannot ignore qualitative differences between Petitioner's four Current Grounds and the claims contained in the exhausted 2004 Grounds.

13. One of Petitioner's Current grounds, the fact that "Petitioner's involuntary commitment under the SVPA violates the . . . Ex Post Facto Clause" (Pet. at 5-6), appears to be identical in all material respects to one of Petitioner's 2004 Grounds, reading "[Petitioner's] commitment as a sexually violent predator violates the Double Jeopardy and Ex Post Facto Clauses," (id. at 3). Indeed, the legal argument in both exhausted and current claims seems to be identical, addressing the interrelation between the Ex Post Facto Clause of the United States Constitution and the power

of the State of New Jersey to invoke the SVPA for the purposes of civil commitment of persons in Petitioner's position. Moreover, since the claim does not appear to turn on the factual findings unique to Petitioner's 2004 commitment hearing, the Court can justifiably conclude that the ex post facto challenge to Petitioner's current order of commitment and the challenge to his 2004 commitment order that was fully exhausted by Petitioner are sufficiently identical in all material respects.

14. None of Petitioner's three remaining Current Grounds could be deemed sufficiently identical, in all material respects, to Petitioner's 2004 Grounds. In fact, two of Petitioner's Current Grounds (reading "Petitioner's commitment should be vacated as the State has denied Petitioner a less restrictive alternative" and "[t]he Equal Protection [Clause] require[s] that Petitioner be afforded a trial by jury [as it is done under] the Kansas' [Sexually Violent Predator] Act") present legal issues having nothing in common with Petitioner's 2004 Grounds. Thus, these two Current Grounds are wholly unexhausted for the purposes of this Court's collateral review.[11] Although these two

[11] Indeed, this Court cannot rule out the possibility that Petitioner actually exhausted these two 2004 Grounds but omitted to so inform this Court in his Petition. The Court, however, takes Petitioner's allegations stated in his Petition as true, accord note 1, supra, and rules accordingly.

Current Grounds might not prove meritorious, as drafted, they do not allow the Court to find, at the instant juncture, that these Grounds raise issues addressable without the prerequisite of exhaustion, e.g., issues of purely state law or those clearly established in state courts, or those necessarily failing to state a viable federal challenge.[12] Compare DeFoy, 393 F.3d at 444-45 (finding an exception to the exhaustion requirement where the accumulated state case law conclusively indicated the state courts' position and assured that the inmate would be denied relief if he were to raise his constitutional challenges in state courts).

15. Mere similarities in language between Petitioner's Current Ground reading "[t]he [state] court erred in relying on

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[12] Petitioner's Ground Three, implicating the right to interstate migration, is framed in terms that may be interpreted as a facial challenge to the SVPA (i.e., challenging the constitutionality of the state provision as drafted) and, in addition, asserting challenges to the SVPA as applied in Petitioner's case on September 23, 2004. Moreover, the heading of Petitioner's Ground Four is not wholly representative of Petitioner's argument associated with Ground Four. While it is apparent that Petitioner misreads the Equal Protection Clause as mandating identical treatment of sexually violent predators in Kansas and New Jersey (failing to realize that no federal equal protection rights are implicated by a state's enactment of sexually violent predator provisions, and the State of New Jersey has no constitutional obligation to follow the Kansas model), Petitioner's Memorandum articulates a claim vaguely resembling that address in Apprendi v. New Jersey, 530 U.S. 466 (2000) (see Mem. at 44 (arguing that any civil commitment requires a trial before a jury)), hence preventing this Court from deeming this claim excused from exhaustion as facially meritless.

hearsay from testimony of expert witnesses, [and] the State failed to prove by clear and convincing evidence that Petitioner should have been involuntary committed" and his two 2004 Grounds reading, jointly, "[t]he [state] court erred in relying on hearsay contained in the testimony of the expert witnesses, [and the] State failed to prove by clear and convincing evidence . . . that [Petitioner] was subject to commitment as a sexually violent predator" (Pet. at 3, 5-6), do not necessarily indicate that Petitioner duly exhausted that Current Ground. To the contrary, while it appears sufficiently certain that the legal aspect of Petitioner's Current Ground was properly presented to all levels of the state court, it appears also virtually certain that the challenges presented during the exhaustion process were factually based on the content of expert testimony and other evidence utilized during Petitioner's 2004 commitment hearing. However, without making certain assumptions about issues never addressed in the current Petition,[13] the Court has no reason to conclude that the factual predicate of Petitioner's exhausted claims is identical in all material respects to that of his Current Grounds, since the Petition

[13] Specifically, the Court will not theorize about whether Petitioner's current order of commitment was based on the same evidence, including the same expert testimony and the same shortcomings as to the timeliness of the expert evaluation, that was used by the State during Petitioner's 2004 hearing.

is wholly silent as to this issue. Consequently, this Court finds that only one of Petitioner's Current Grounds (the ex post facto issue) is duly exhausted and, in the event Petitioner actually raised that particular Ground during his latest commitment hearing, may be subject to the Court's instant collateral review.

16. Even if the Court is to read the exhaustion requirement broadly, the Petition presents, at best, a "mixed" application for the purposes of Petitioner's attack on the fact of his current confinement. Generally, the enactment of a one-year statute of limitations for § 2254 habeas petitions, see 28 U.S.C. § 2244(d), "'has altered the context in which the choice of mechanisms for handling mixed petitions is to be made,'" Crews v. Horn, 360 F.3d 146, 151 (3d Cir. 2004) (quoting Zarvela v. Artuz, 254 F.3d 374, 379 (2d Cir.), cert. denied, 534 U.S. 1015 (2001)). Because of the one-year limitations period, dismissal of a timely-filed mixed petition may forever bar a petitioner from returning to federal court. Consequently, "[s]taying a habeas petition pending exhaustion of state remedies is a permissible and effective way to avoid barring from federal court a petitioner who timely files a mixed petition." Crews, 360 F.3d at 151. However, such a stay "should be available only in limited circumstances." Ellison v.

Rogers, 484 F.3d 658, 662 (3d Cir. 2007) (citing Rhines v. Weber, 544 U.S. 269, 277 (2005)). Alternatively, "if a petitioner presents a district court with a mixed petition and the court determines that stay and abeyance is inappropriate, the court should allow the petitioner to delete the unexhausted claims and to proceed with the exhausted claims if dismissal of the entire petition would unreasonably impair the petitioner's right to obtain federal relief." Rhines, 544 U.S. at 278 (citations omitted). This Court concludes that, for the reasons detailed below, a grant of stay and abeyance appears inappropriate, and a decision to dismiss the entire Petition would not unreasonably impair Petitioner's right to obtain relief.

17. The stay-and-abeyance analysis was coined as a result of the federal judiciary's concern that a petitioner who timely files a mixed petition might be still disfranchised of his ability to obtain federal relief through the operation of applicable statute of limitations. See Crews, 360 F.3d at 151. However, a habeas challenge by a civilly committed individual, amenable to a continuous commitment only through the mode of yearly re-commitment hearings conducted on de novo basis, cannot, by definition, become untimely. On April 24, 1996, Congress enacted AEDPA, which provides that "[a] 1-year period of limitation shall apply to an

application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court." 28 U.S.C. § 2244(d)(1). The limitations period begins to run from "the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review." Id. In other words, if the petitioner "does not pursue a timely direct appeal, . . . his [one-year] statute of limitation begins to run, on the date on which the time for filing such an appeal expired." Kapral v. United States, 166 F.3d 565, 577 (3d Cir. 1999). Applying this rule to the case of a civilly committed petitioner subject to yearly re-commitment proceedings, it is apparent that, even if the petitioner does not take any appellate action, his statute of limitations would expire only after the "one year, plus the time to seek the first level of appellate review" period, that is, by the time when that petitioner would be in custody already pursuant to the next, superceding order. Consequently, by the time the petitioner's habeas challenge might be in danger of becoming untimely, this very challenge would necessarily fall outside federal jurisdiction because of the operation of the "in custody" requirement. Conversely, a challenge to the fact of the petitioner's order of current confinement meeting the "in custody" requirement would necessarily be timely through

the operation of the yearly re-commitment mode of New Jersey SVPA. Since it follows that a grant of stay and abeyance would be futile for the purposes of preserving the right of a civilly committed individual to obtain federal habeas relief, this Court declines to grant Petitioner a stay.

18. The Court similarly finds that denying Petitioner the opportunity to delete his two facially unexhausted and one likely-to-be-unexhausted Current Ground would not unreasonably impair Petitioner's right to obtain federal relief. Indeed, as the foregoing discussion illustrates, at the current juncture, the Court has no information as to whether Petitioner even stated his sole potentially-exhausted ground during the commitment proceedings underlying his current confinement. In light of: (a) the fact that Petitioner's habeas challenge cannot become time-barred; (b) the uncertainties associated with the issue of whether the state courts' ruling on Petitioner's ex post facto claim is "recent enough" to constitute the present position of state judiciary; and (c) the fact that the first three of Petitioner's four claims are either facially or potentially unexhausted, this Court finds that dismissal of Petitioner's instant application is warranted. Petitioner's ability to file another petition challenging his current commitment (provided that he meets his burden of showing

exhaustion of his challenges pertinent to the order of commitment pursuant to which Petitioner is in custody at the time of his filing of such challenges) sufficiently protects Petitioner's right to obtain habeas relief (including relief in the form of release from confinement). Moreover, Petitioner's ability to file a civil rights challenge to his current order of commitment without having the obligation to meet the exhaustion requirement (in the event Petitioner wishes to seek remedy other than release), provides additional protections to Petitioner's federal rights, hence warranting dismissal of the instant matter.[14] Accordingly,

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[14] The scheme of the SVPA, although not guaranteeing a civilly committed individual's right to initiate compulsory review of his commitment at any point in time, allows such individual to, at least, seek such at any time. See N.J. Stat. Ann. § 30:4-27.36(d) ("Nothing in [the SVPA] shall prohibit a person from filing a petition for discharge from involuntary commitment status without authorization from the Department of Human Services. Upon receipt of such a petition, the court shall review the petition to determine. . . whether [a new hearing should be conducted because] the condition of the person has so changed . . . that a hearing is warranted, or [because] a professional expert evaluation . . . stating . . . the person is not likely to engage in acts of sexual violence if released [has been entered]"). In addition, the SVPA provides for the state court's right to conduct re-commitment hearings as often as once a month. N.J. Stat. Ann. § 30:4-27.35 ("The court may schedule additional review hearings but, except in extraordinary circumstances, not more often than once every 30 days"). Consequently, if Petitioner is of the opinion that his current order of civil commitment is constitutionally deficient, and Petitioner's efforts to obtain a curative hearing under the aforesaid state provisions proved futile, nothing prevents Petitioner from seeking a non-release injunctive relief and/or damages through filing of a federal civil action.

IT IS on this 20th day of June, 2008,

ORDERED that the Petition is dismissed for failure to exhaust state remedies, pursuant to 28 U.S.C. § 2254,[15] WITHOUT PREJUDICE to Petitioner's filing a petition setting forth claims that Petitioner believes to be duly exhausted or subject to exception to the exhaustion requirement; and it is further

ORDERED that the a certificate of appealability will not issue, pursuant to 28 U.S.C. § 2253(c); and it is further

ORDERED that the Clerk shall serve this Order upon Petitioner by regular U.S. mail and close the file in this matter.

SO ORDERED.

/s/ Jose L. Linares
United States District Judge

[15] This conclusion applies regardless of whether the Petition is construed as challenging Petitioner's expired order rendered in 2004 and directing civil commitment for one year, or his current order of civil commitment entered after 2004.